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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LLOYD PERKINS,
Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Does questioning by an undisclosed undercover agent constitute reinterrogation forbidden by *Arizona v. Roberson* merely because the suspect is incarcerated?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
THE DECISION BELOW, WHICH INVOLVES A QUESTION NOT PRESENTED TO THIS COURT IN ITS EARLIER DECISION IN THIS CASE, SIGNIFICANTLY UNDERMINES LEGITIMATE LAW ENFORCEMENT PRACTICES AND THE TRUTH-SEEKING FUNCTION OF TRIAL BY AN UNWARRANTED EXTENSION OF *ARIZONA v. ROBERSON* ...	6
CONCLUSION	11

APPENDIX

	PAGE
Opinion of the Appellate Court of Illinois, Fifth Judicial District, affirming the suppression of evidence, dated August 11, 1993	1a
Order of the Appellate Court of Illinois, Fifth Judicial District, denying the Petitioner's petition for rehearing, dated September 14, 1993 .	15a
Order of the Supreme Court of Illinois, denying the petition for leave to appeal, dated December 1, 1993	16a
Order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, suppressing evidence, dated December 2, 1991	17a
Order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, denying the Petitioner's motion to reconsider, dated June 10, 1992	21a

TABLE OF AUTHORITIES

Cases PAGE

Arizona v. Roberson, 486 U.S. 675 (1988) 4, 5, 6, 7, 8, 9, 10

Edwards v. Arizona, 451 U.S. 477 (1981) 4, 6, 7, 8, 9, 10

Hoffa v. United States, 385 U.S. 293 (1966) ... 9

Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) 3, 5, 7, 8, 9

McNeil v. Wisconsin, 501 U.S. ____, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) 8

Miranda v. Arizona, 384 U.S. 436 (1966) 3, 4, 5, 7, 8, 9, 10

Constitutional Provision

U.S. Const., amend. V 3

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LLOYD PERKINS,
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Petition for Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

PETITION FOR WRIT OF CERTIORARI

The petitioner, People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fifth Judicial District, entered in the above-captioned proceedings on August 11, 1993.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth Judicial District, is reported at 248 Ill.App.3d 762, 618 N.E.2d 1275, 188 Ill.Dec. 705 (5th Dist. 1993), and reproduced in the appendix hereto, p. 1a, *infra*.

The order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, suppressing statements is not reported. It is reproduced in the appendix hereto, p. 17a, *infra.*

The order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, denying the petitioner's motion to reconsider is not reported. It is reproduced in the appendix hereto, p. 21a, *infra.*

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, was entered on August 11, 1993, affirming the lower court's pre-trial suppression of evidence on December 2, 1991. A timely petition for rehearing filed by the petitioner was denied September 14, 1993, and a timely petition for leave to appeal to the Illinois Supreme Court was denied December 1, 1993. The order of the Illinois Supreme Court denying the petition for leave to appeal is reproduced in the appendix hereto, p. 16a, *infra.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The respondent was charged in the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, with the November 8, 1984, murder of Richard Stephenson in Fairview Heights, Illinois. (C. 1, 24) Prior to trial, he filed a motion to suppress statements that he alleged were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). (C. 31-32) The circuit court granted the motion after a hearing, and the Appellate Court of Illinois, Fifth Judicial District, affirmed that ruling. Ultimately, this Court reversed the decision by the Appellate Court of Illinois, and remanded the case (*Illinois v. Perkins*, 496 U.S. 292 (1990)), holding that statements the respondent made to an undercover police officer while in jail for an un-

related offense were admissible because the *Miranda* warnings are not required when the suspect is speaking with a law enforcement officer.

On remand, the respondent filed a new pre-trial motion to suppress statements, alleging that they were elicited in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988). (C. 192-93)

At the hearing on the respondent's motion, it was established that the respondent was arrested on March 29, 1986, in Montgomery County, Illinois, for aggravated battery and a weapons offense. (R. 154, 166) According to the respondent, he told the arresting officers that he wanted a lawyer[1] (R. 87-88); the officer who gave the respondent the *Miranda* warnings did not recall the respondent asking for a lawyer. (R. 204, 210)

While the respondent was in the Montgomery County Jail for the weekend, undercover agent John Parisi and prison inmate Donald Charlton, posing as jail inmates, were placed in the cellblock, which contained approximately 12 cells, all of which opened on a larger room having a table. (R. 8-13, 39) Earlier, Charlton had told law enforcement officers that, while he was in prison with the respondent, the respondent told him that he killed Stephenson. (R. 5-7, 57-59)

After Charlton spoke with the respondent briefly in the Montgomery County Jail, he introduced the respondent and Parisi. The three discussed escaping from the jail and agreed to meet again after the other inmates were asleep.

---

[1] In the pre-remand record, there was no evidence that respondent had requested counsel at the time of his arrest for aggravated battery.

The respondent, who appeared to be familiar with the operation of the jail, then showed Parisi a crowbar that was hidden in the bathroom and could be used in the jail break. (R. 40-42, 65-66)

About 11:30 p.m., the respondent, Charlton, and Parisi entered cell number 6, sat on the floor, and began discussing their escape plans. When the talk turned to killing anyone who interfered with their escape, Charlton proclaimed that he was not a murderer and deferred to the others. Parisi asked the respondent whether he had ever killed anyone, and the respondent replied that he had killed a man in Fairview Heights. At least partially in response to questions from Parisi and Charlton, the respondent related details of the murder. (R. 43-49, 67-70)

The respondent testified that Parisi looked like and talked like a "biker," not like a police officer. Parisi had a tattoo of an eagle on his arm and he wore a Fu-Manchu beard. The respondent did not imagine that the police would ever place an undercover police officer in jail with him, and he did not realize while speaking with him that Parisi was a police officer. (R. 92-93, 96)

Upon completing his account of the murder of Stephenson, the respondent lay down on the floor and slept. (R. 50) Subsequently, he was arrested for murder, was admonished pursuant to *Miranda*, and invoked his right to counsel. (R. 15)

The trial court agreed with the respondent's argument that the police had failed to honor his fifth amendment right to counsel and suppressed his statements on the basis of *Arizona v. Roberson*. (C. 204-06; R. 221) The court rejected the petitioner's motion to reconsider (C. 207-23), which argued that this Court's decision in *Illinois v. Perkins* was equally applicable to the issue before the

court. (C. 224-25) On the petitioner's pre-trial appeal pursuant to Illinois Supreme Court Rule 604(a)(1) (134 Ill.2d R. 604(a)(1)), the petitioner raised the issue of whether *Arizona v. Roberson* was applicable when the respondent did not realize that he was speaking with a police officer, as well as the issue of whether the trial court's finding that the respondent had requested the services of an attorney prior to his conversation with Parisi and Charlton was against the manifest weight of the evidence. In a decision issued August 11, 1993, the Appellate Court of Illinois, Fifth Judicial District, affirmed the trial court's order; in an order issued September 14, 1993, the Appellate Court of Illinois, Fifth Judicial District, denied the petitioner's petition for rehearing; and on December 1, 1993, the Illinois Supreme Court denied the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, WHICH INVOLVES A QUESTION NOT PRESENTED TO THIS COURT IN ITS EARLIER DECISION IN THIS CASE, SIGNIFICANTLY UNDERMINES LEGITIMATE LAW ENFORCEMENT PRACTICES AND THE TRUTH-SEEKING FUNCTION OF TRIAL BY AN UNWARRANTED EXTENSION OF *ARIZONA v. ROBERSON*.

The court below held that an incarcerated suspect is subjected to custodial reinterrogation as proscribed by *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988), whenever he is questioned by a governmental agent after having once invoked his fifth amendment right to an attorney in an unrelated case,

despite the suspect's ignorance of the agent's status and the absence of any other potentially coercive circumstances. However, as the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), was held not to apply to statements elicited from jail inmates by undercover agents posing as fellow inmates, in *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), so should the prophylactic rule of *Edwards* and *Roberson* be held not applicable to the instant case because there was no "coercive atmosphere" of an interrogation by persons known to be police officers. *Illinois v. Perkins*, 496 U.S. at ____, 110 S.Ct. at 2397.

Even when a suspect in custody has asked for a lawyer, the *Edwards/Roberson* rule prohibiting further interrogation unless counsel has been made available to him is not applicable to the circumstances of the suspect's making statements to persons he thinks are fellow inmates. The basis for denying application of the rule is the same as that identified in *Illinois v. Perkins*.

In *Perkins*, this Court pointed out that the purpose of the *Miranda* warnings is to preserve to individuals their fifth amendment rights during "incommunicado interrogation" in a "police-dominated atmosphere," an atmosphere which may create "inherently compelling pressures" undermining the person's will to resist and compelling him to speak when he might not otherwise do so. 496 U.S. at ____, 110 S.Ct. at 2397. However,

> [c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. . . .
>
> * * *

> *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent's future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril. [496 U.S. at ____, 110 S.Ct. at 2397-98.]

The *Miranda* warnings constitute a "prophylactic" rule designed to counteract the "inherently compelling pressures" of custodial interrogation. *McNeil v. Wisconsin*, 501 U.S. ____, ____, 110 S.Ct. 2204, 2208, 115 L.Ed.2d 158 (1991). *Edwards v. Arizona* established a "second layer of prophylaxis for the *Miranda* right to counsel" designed to prevent the police from "badgering" a suspect into relinquishing his previously asserted *Miranda* rights. *McNeil v. Wisconsin*, 501 U.S. at ____, 111 S.Ct. at 2208.

Thus, flowing as it does from *Miranda*, the *Edwards/Roberson* rule is a prophylactic rule designed to protect a suspect from having his will to resist overcome by the "inherently compelling pressures" of "incommunicado interrogation" in a "police-dominated atmosphere." But if the suspect does not realize that the person to whom he is speaking is a police officer, then he is not subjected to those "inherently compelling pressures" in a "police-dominated atmosphere."

In the instant case, by his own testimony, the respondent clearly believed that he was speaking with fellow inmates. He thought that Parisi was a "biker." Parisi did

not look like a police officer and the idea that the police would place an undercover agent in jail with him had not crossed the respondent's mind. If the respondent had not wanted to talk with Parisi, he was free to move to a different part of the large cellblock of the jail or to tell Parisi to leave him alone or to ignore him. Therefore, Parisi could not have intimidated the respondent in that jail setting as the *Edwards/Roberson* rule presumes police officers intimidate persons who know that they are being interrogated by police officers.

Constitutionally speaking, the respondent was in the same position as the defendant in *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the defendant was on trial for one offense and, while not in custody, made statements to an informer that were used against him at a subsequent trial for a different charge. This Court held that the defendant's Fifth Amendment privilege against self-incrimination was not violated by the use of the statements. 385 U.S. at 303-04.

In the instant case, especially in light of *Illinois v. Perkins*, the respondent's speaking with another whom he thought was a fellow jail inmate about an offense with which he had not been charged was the functional equivalent of the defendant in *Hoffa* speaking with the informant there. Neither the respondent nor the defendant in *Hoffa* was in the type of "police-dominated atmosphere" of an interrogation room. Either could have refused to talk without any expectation that his refusal would result in reprisals from a police officer. Both misplaced their trust in others who appeared to be compatriots. As far as *Miranda* is concerned, the situations are the same, and *Miranda* and its progeny are just not applicable.

Further, there was no "interrogation." Rather, the respondent freely participated in a conversation during

which he bragged about his murdering the victim. The prophylactic rule of *Edwards/Roberson* was designed to shield a suspect from an overbearing government, not to protect him from his own indiscretion of confiding in persons who he believes are fellow inmates.

In short, the respondent was not coerced, by persons he knew to be police officers in the carefully controlled atmosphere of a police interrogation room, into speaking when he otherwise would not have done so. On the contrary, he willingly participated in a conversation and made statements that he hoped would impress the others. Hence, the rules established by *Miranda*, *Edwards*, and *Roberson* are just not applicable to the case at bar, and the lower court erred in holding to the contrary.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

248 Ill.App.3d 762
618 N.E.2d 1275

The PEOPLE of the State of Illinois,
Plaintiff-Appellant,
v.
Lloyd PERKINS, Defendant-Appellee.

No. 5-92-0415.

Appellate Court of Illinois,
Fifth District.

Aug. 11, 1993.

Rehearing Denied Sept. 14, 1993.

In a murder prosecution, the Appellate Court, 176 Ill. App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141, upheld an order suppressing statements the defendant made to undercover agents posing as fellow inmates. The United States Supreme Court reversed and remanded, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243. On remand from the Appellate Court, 207 Ill.App.3d 1124, 178 Ill.Dec. 332, 604 N.E.2d 588, the Circuit Court, St. Clair County, James K. Donovan, J., suppressed statements, and state appealed. The Appellate Court, William A. Lewis, J., held that: (1) finding that defendant asserted right to counsel was not manifestly erroneous, and (2) once defendant asserted right to counsel, he could not be questioned about unrelated matter.

Affirmed.

* * * * *

JUSTICE WILLIAM A. LEWIS delivered the opinion of the court:

The issue presented in this appeal is whether a defendant who is in jail for an offense for which he has as-

serted his fifth amendment right to counsel can be surreptitiously questioned by undercover agents regarding a second, unrelated offense. We hold that under the circumstances and facts of this case, the surreptitious questioning by undercover government agents violated defendant's fifth amendment privilege against self-incrimination. U.S. Const., amend. V.

On Saturday, March 30, 1986, defendant was arrested for aggravated battery. While in jail over the weekend, an undercover law enforcement officer and undercover informant entered defendant's jail cell and elicited incriminating statements from defendant regarding a 1984 murder. On February 18, 1987, defendant's motion to suppress those statements was heard, and later, that motion was granted by the trial court. This court affirmed the trial court's order (*People v. Perkins* (1988), 176 Ill.App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141), and the United States Supreme Court reversed the decisions of both courts in *Illinois v. Perkins* (1990), 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243, finding that the undercover agents were not required to give defendant *Miranda* warnings. The Supreme Court was not asked to rule upon the facts or issues presented in this appeal. *Illinois v. Perkins* (1990), 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243.

After the case was remanded to the trial court, 207 Ill. App.3d 1124, 178 Ill.Dec. 332, 604 N.E.2d 588, defendant filed a second motion to suppress, alleging for the first time that he had asserted his right to counsel after his arrest on the aggravated battery charge and that the subsequent questioning by the undercover agents violated his sixth amendment rights. (U.S. Const., amend. VI.) However, on appeal defendant does not argue that his sixth amendment rights have been violated but only that his fifth amendment privilege against self-incrimination was

violated when the undercover agents questioned him without an attorney present and without informing him that his statements could be used against him.

The trial court granted defendant's motion to suppress, stating that defendant had testified that he had requested an attorney immediately upon his arrest for aggravated battery but the officers involved could not remember if defendant had requested an attorney. The court ruled that, considering all the testimony presented, the State had failed to meet its burden of proof regarding the voluntariness of defendant's incriminating statements to the undercover agents. In its order granting the motion to suppress, the trial court quoted from *McNeil v. Wisconsin* (1991), 501 U.S. ____, 111 S.Ct. 2204, 115 L.Ed.2d 158; "[O]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." (Emphasis in original.) *McNeil*, 501 U.S. at ____, 111 S.Ct. at 2208, 115 L.Ed.2d at 168, citing *Arizona v. Roberson* (1988), 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed. 2d 704.

The State again appeals the trial court's order granting defendant's motion to suppress, arguing that defendant's fifth amendment privilege against self-incrimination was not violated and also that the trial court's ruling that defendant had invoked his right to counsel was against the manifest weight of the evidence. Thus, we must reiterate the evidence presented at the hearings on defendant's second motion to suppress. However, because the case has already been appealed to this court, we will reiterate only those facts brought out in the second motion hearing and we refer to our prior decision for a more complete recitation of the facts. *People v. Perkins* (1988), 176 Ill.App.3d 443, 126 Ill.Dec. 8, 531 N.E.2d 141.

Defendant testified in his own behalf at the hearing on the second motion, something he did not do at the hearing on the first motion. Defendant testified that on the morning of March 30, 1986, a group of police came to his girl friend's trailer and asked him to go to the police station with them so that they could ask him a few questions. Defendant went to the station voluntarily, and while he was there, a call came in over the radio that the officers who were conducting a consent search of the girl friend's trailer had found a shotgun. Defendant was placed under arrest but was not given his *Miranda* warnings at this time. From the record of the case after the first motion to suppress, it appears that defendant was given his *Miranda* warnings upon arrival at the police station, before his arrest, by the officer who transported defendant to the station. Defendant testified that he stated he would like to have a lawyer, explaining that he had been arrested a few times before and knew he wanted a lawyer. Defendant further testified that the arresting officer then told defendant that if he wanted to "play hardball" he was going to jail. Defendant was then transported to the Montgomery County Jail. Defendant stated that he asked for an attorney more than once but was told that he would get an attorney on Monday when he went to court for his first appearance. Defendant said that he was not allowed to telephone an attorney, but if he had been allowed to do so, he would have called the public defender that was representing him at that time on another pending charge.

While in jail over the weekend, before his first appearance and before talking to an attorney, two men were placed into the cell with defendant. Defendant thought that both men were under arrest, just as he was. Defendant knew one of the men, Donald Charlton, from a prior

prison sentence, during which he bacame acquainted with Charlton. The other man, John Parisi, who went by the pseudonym of Vito Bianco in jail, appeared to be a biker. Defendant testified that Charlton and Parisi had initiated the conversation with him, that he told them stories he had heard in prison to impress them, and that he did not realize that he was talking to anyone who would seek to use his statements against him.

On Monday, when defendant was taken to the courthouse on his first appearance for the aggravated battery charge, he was arrested on the murder charge, based upon the incriminating statements he had made to Charlton and Parisi. Defendant did not know that Parisi was an undercover government agent until this time. Immediately upon his arrest for murder, defendant again asserted that he wanted a lawyer, but defendant stated that the arresting officers continued to try to question him with no lawyer present. Defendant did not make any statement to the officers who arrested him on the murder charge. On cross-examination, defendant was impeached with a long history of criminal involvement.

After defendant's testimony, the hearing was continued to allow the State to notify its witnesses. When the motion came on for hearing again, five officers testified for the State, three of whom had had very little contact with defendant as a result of his arrest for aggravated battery and did not report having any conversations with him. Officer Jerry Cahill, of the Litchfield Police Department, testified that on the morning of March 30, 1986, he interviewed the victim of a fight at the hospital and then arranged the visit to the trailer where defendant was known to be staying. Cahill asked defendant to come to the police station to answer some questions, and defendant did so voluntarily. While another officer transported defendant

to the station, Cahill conducted the search of the girl friend's trailer and then went back to the station and told defendant that he was under arrest. Cahill did not give defendant his *Miranda* warnings at the time of his arrest but had previously instructed the officer who transported defendant to the station to do so "in case he would say something." After defendant was placed under arrest, he stayed at the police station for about 15 to 20 minutes waiting for the jail officials to pick him up and take him to jail, during which time defendant's girl friend and mother came in and talked to him.

Cahill testified that from the time he first saw defendant that morning at the trailer until the time he left to go to the jail, a total of about 30 minutes, defendant did not, in his presence, request an attorney. Additionally, although Cahill had arrested defendant previously some five to 10 times, he never heard defendant request an attorney in the past. On cross-examination, Cahill stated that he had originally intended to question defendant after he got back to the station, but he did not do so because he had already located the gun believed to be used in the aggravated battery and had interviewed witnesses, so that there was no longer any need to question defendant. Further, in his past experience with defendant, he had never known him to talk or give any information to law enforcement officials, and as far as he could remember, defendant had not asked for an attorney in any prior arrest. Cahill admitted that he could not remember what the prior charges or circumstances of arrest were. Because defendant had been charged with aggravated battery, he was not entitled to have bond set until his first appearance on Monday after the Saturday arrest, so that defendant did not have any choice but to stay in jail over the weekend.

Jeff Davis, the Litchfield police officer who transported defendant from the trailer to the police station, testified that, at the station, he advised defendant of his *Miranda* rights, and defendant stated that he understood his rights. Davis could not recall specifically if defendant had requested an attorney during the time he was in defendant's presence, approximately 30 to 45 minutes. Davis stated that although he did not recall defendant asking for an attorney, his customary practice was to make a report for any suspect who had done something unusual, such as request an attorney, and that he had not made any report concerning his contact with defendant.

We will first consider the State's argument that the trial court's finding that defendant had invoked his right to an attorney is against the manifest weight of the evidence. As the trier of fact in a suppression hearing, the function of the trial judge is to determine the credibility of the witnesses, the weight to be given their testimonies, and the inferences to be drawn from the evidence. (*People v. Akis* (1976), 63 Ill.2d 296, 347 N.E.2d 733.) If evidence is merely conflicting, a court of review should not substitute its judgment for that of the trial judge. (*People v. Spivey* (1991), 209 Ill.App.3d 584, 154 Ill.Dec. 327, 568 N.E.2d 327.) The trial judge's decision on a suppression motion should not be overturned unless manifestly erroneous. *People v. Sullivan* (1991), 209 Ill.App.3d 1096, 154 Ill.Dec. 447, 568 N.E.2d 447.

Based upon the record in this case, we are not prepared to say that the trial court's finding that defendant had invoked his right to counsel was manifestly erroneous. To do so would be to substitute our judgment for his, which we decline to do, since the evidence upon which the decision was made was conflicting. While Officer Cahill testified that defendant did not assert his right to counsel,

Officer Davis could not remember. Defendant testified unequivocally that he had asserted his right to counsel. As defendant pointed out in oral argument, to make a finding that the trial judge was manifestly erroneous on this issue of fact would amount to a finding that the defendant is inherently unbelievable, something we cannot do from the reading of a record on appeal alone. Furthermore, as the State has pointed out more than once, defendant was thoroughly impeached on cross-examination. Contrary to the State's argument, we do not feel that the impeachment gives us the right to take the decision out of the hands of the trial judge, but we feel, instead, that the trial judge considered this evidence in making his decision and found in favor of defendant anyway. Thus, we hold that the trial court's finding that defendant had asserted his right to counsel was not against the manifest weight of the evidence.

Upholding the trial judge's determination that defendant had asserted his right to counsel brings us to the crux of this case: Where a suspect has asserted his fifth amendment right to counsel, can he be questioned by undercover agents on a separate, unrelated, and uncharged offense while in jail, without the presence of an attorney, and without an opportunity to waive his right to counsel? We feel that the actions of the undercover agents in this case violated defendant's fifth amendment right to counsel, and therefore, we affirm the trial court's order granting defendant's motion to suppress.

The *Miranda* decision (*Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) sets forth the applicable fifth amendment guarantees. If a suspect in custody "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no further questioning." (*Miranda*,

384 U.S. at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07.) The *Miranda* decision was primarily concerned with typical incommunicado interrogation of individuals in a police-dominated atmosphere and the resulting self-incriminating statements made without a full warning of the individual's constitutional right to remain silent. However, the Court did not limit its holding to high-pressure interrogation-room questioning only but went further to find that the privilege against self-incrimination "has always been 'as broad as the mischief against which it seeks to guard.' " (*Miranda*, 384 U.S. at 459-60, 86 S.Ct. at 1620, 16 L.Ed. 2d at 715, quoting *Counselman v. Hitchcock* (1892), 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110.) For a self-incriminating statement of a defendant in custody to be upheld, it must be voluntarily made, and it will not be considered voluntary if it would not have been made *but for* improper influences of the law enforcement officials. *Miranda*, 384 U.S. at 462, 86 S.Ct. at 1621, 16 L.Ed.2d at 716, citing *Bram v. United States* (1897), 168 U.S. 532, 18 S.Ct. at 183, 42 L.Ed. 568.

Miranda establishes that a person has a fifth amendment right to have an attorney present during any official questioning, if he so desires, and requires that the officials cease questioning a suspect immediately upon a request for an attorney. If the questioning continues after a suspect has requested an attorney, but without the attorney's presence, then a heavy burden is on the government to show that the suspect knowingly and intelligently waived his right to counsel. Further, although any statement given freely and voluntarily without any compelling influences is admissible in evidence, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda*, 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725.

Later Supreme Court cases have provided more guidance on the issue of a defendant's fifth amendment privilege against self-incrimination. "It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " (*Edwards v. Arizona* (1981), 451 U.S. 477, 482, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378, 385, quoting from *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466.) Initially, then, in the particular facts of our case, the government's procedure was calculated to deceive defendant, so that he would not know to whom he was making incriminating statements. Therefore, we do not find that defendant was given an opportunity to knowingly and intelligently waive his previously asserted right to have counsel present during questioning.

Edwards holds that:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386.)

We cannot say that defendant initiated the conversation with the undercover agents in this case because they con-

cocted the elaborate scheme that put them into contact with defendant, and they first began talking to defendant and asked the question that began the incriminating statements: "Have you ever done anyone?" Additionally, even if defendant had sought out the undercover agents first, and even if he had begun the conversation that led to his incriminating statements, he could not have known that he was talking to the "authorities." Rather, he merely "responded to further police-initiated custodial interrogation" (*Edwards*, 451 U.S. at 484, 101 S.Ct. at 1885, 68 L.Ed.2d at 386), and a valid waiver cannot be found under those facts.

However, the custodial interrogation to which *Edwards* applied was regarding the same offense for which the defendant in that case was in custody. A factual situation more closely related to the case *sub judice* is *Arizona v. Roberson* (1988), 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704, wherein the Court held that the police cannot initiate interrogation of a suspect on a second, unrelated offense if the suspect does not have an attorney present, if he has previously requested an attorney for the first offense. The Court goes on to state that the fifth amendment privilege against self-incrimination, as opposed to the sixth amendment right to counsel, which does not attach until the suspect has been formally charged with a specific crime, is protected by having an attorney present to "counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Arizona v. Roberson*, 486 U.S. at 685, 108 S.Ct. at 2100, 100 L.Ed.2d at 716.

Therefore, it is obvious that defendant's sixth amendment right to counsel had not attached regarding the

murder charge for which the undercover agents engaged him in conversation, but that his fifth amendment privilege against self-incrimination had attached, since the trial court found, and we cannot disagree, that defendant had asserted his fifth amendment rights prior to the undercover questioning. "Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists." *Arizona v. Roberson*, 486 U.S. at 687-88, 108 S.Ct. at 2101, 100 L.Ed.2d at 717.

A final issue in our analysis of this case is whether the conduct of the undercover agents amounted to interrogation, for if it did not, then defendant's fifth amendment privilege would not have been violated. In considering this issue, *Arizona v. Roberson* points to *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, for instruction regarding the nature of interrogation. *Innis* considered a factual scenario wherein the defendant was under arrest for murder and was being transported in a squad car to the police station. He had been advised of his *Miranda* rights, and he had requested an attorney. On the way to the police station, the two transporting officers engaged in a conversation with each other about a gun that was missing from the murder scene and how terrible it would be if one of the children from the school for handicapped children nearby found the gun and was hurt. The defendant immediately told the officers to turn the car around so that he could take them to the gun. He then lead them to the spot where the gun was hidden.

The Supreme Court upheld the trial court's denial of the defendant's motion to suppress even though the Court found that the defendant was in custody at the time the

incriminating statements were made and had invoked his right to counsel. The issue in the case was whether the defendant had been interrogated by the officers in violation of his fifth amendment right to remain silent until he had consulted with a lawyer. The Court specifically stated that it did not reach the question of whether he had waived his right to counsel, since it found that the officers' conversation with each other did not amount to interrogation. In ruling that the defendant had not been interrogated under the particular facts of that case, the Court in *Innis* declined to limit the *Miranda* decision to direct questioning but held instead that it applies as well to other, less direct techniques of persuasion. "To limit the ambit of *Miranda* to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.' " (*Innis*, 446 U.S. at 299 n. 8, 100 S.Ct. at 1689 n. 8, 64 L.Ed.2d at 307 n. 8, quoting *Commonwealth v. Hamilton* (1971), 445 Pa. 292, 297, 285 A.2d 172, 175.) The Court ruled that anytime a person is in custody, if he is subjected to express questioning or its functional equivalent, the *Miranda* safeguards are in place, and any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Innis*, 446 U.S. at 301, 100 S.Ct. at 1690, 64 L.Ed.2d at 308.

The authorities in the case *sub judice* knew or should have known that the ruse they played on defendant was reasonably likely to evoke an incriminating response from him. Since defendant had invoked his right to counsel, the actions of the authorities amounted to the functional equivalent of direct questioning and violated the Supreme Court rulings construing the fifth amendment privilege

against self-incrimination. Clearly, defendant would not have made the incriminating statements to the undercover agents "but for" the elaborate scheme engaged in by the agents. Because defendant had invoked his right to counsel, the actions of the authorities were improper and the statements made by defendant must be suppressed. (*Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.) That is not to say that the authorities could not have played out the same scam on defendant if he had not been in custody, because it seems clear that they could have done so without violating defendant's constitutional rights. (See *Hoffa v. United States* (1966), 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (wherein Hoffa was on trial for one offense, but not in custody, and the Court determined that Hoffa's fifth amendment privilege against self-incrimination had not been violated by placement of an undercover informant in his hotel room during trial and that the statements obtained could be used against him in a second, unrelated trial).) For all of the reasons stated, we affirm the trial court's order granting defendant's motion to suppress.

Affirmed.

GOLDENHERSH and MAAG, JJ., concur.

[Filed September 14, 1993]

NO. 5-92-0415

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellant,	)	
v.	)	
	)	No. 86-CF-305
LLOYD PERKINS,	)	
Defendant-Appellee.	)	

ORDER

This cause having been considered on the State's petition for rehearing; and the court being advised in the premises:

IT IS THEREFORE ORDERED that the State's petition for rehearing shall be, and hereby is, DENIED.

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 1, 1993

State's Attorneys Appellate Prosecutor
Fifth Judicial District
Route 15 East, P.O. Box 2249
Mt. Vernon, IL 62864

No. 76277—People State of Illinois, petitioner, v. Lloyd Perkins, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Harrison II, J., took no part.

The mandate of this Court will issue to the Appellate Court on December 23, 1993.

[Filed December 2, 1991]

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

People of the State of Illinois,	)	
	)	
vs	)	No. 86-CF-305
	)	
LLOYD PERKINS	)	
Defendant	)	

ORDER

The above styled case is before the court on defendant's motion to suppress statements given to the police.

On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, Illinois. On June 19, 1986, a St. Clair County grand jury handed down an indictment charging the defendant with murder. On April 8, the circuit court of St. Clair County granted the defendant's motion to suppress statements made to an undercover police officer and to an informant.

The Fifth District Appellate Court affirmed in the case of *People vs Perkins*, (5th Dist. 1988) 176 Ill.App.3d 443. The Illinois Supreme Court did not accept the case for review. *People v. Perkins*, 125 Il.2d 572.

The United States Supreme Court in the case of *Illinois v. Perkins*, (1990) 110 L Ed 2d 243, reversed the state appellate court. The Supreme Court held:

1. Under the federal constitution's Fifth Amendment privilege against self-incrimination, *Miranda* warnings are not required when a suspect is unaware that the suspect is speaking to a law enforcement officer and gives a voluntary statement;
2. An undercover law enforcement officer posing as a fellow inmate is not required to give *Miranda* warnings to an incarcerated suspect before the officer asks questions that may elicit an incriminating response, because the interests protected by *Miranda* are not implicated in such circumstances, in which there is no interaction between custody and official interrogation; and
3. thus, there was no federal obstacle to the admissibility of the statements in the instant case, in which (a) the suspect had been motivated solely by his desire to impress his fellow inmates, (b) the suspect had had no reason to feel that the undercover agent had any legal authority to force the suspect to answer questions or that the agent could affect the suspect's future treatment, (c) the suspect had viewed the cell-mate-agent as an equal and had showed no hint of being intimidated by the atmosphere of the jail, and (d) under the Constitution's Sixth Amendment right to counsel, no charges had been filed regarding the subject of the interrogation.

The case is again before the trial court based on a Fifth Amendment violation. The defendant claims that the police failed to honor his request for an attorney prior to any questioning. A "*Miranda-Edwards* Fifth Amendment" right to counsel. This issue was never discussed by the trial, appellate or supreme court in the prior decisions.

When a defendant challenges the admissability of his confession the State has the burden to establish by a preponderance of the evidence that the confession was voluntary. Ill.Rev.Stat., 1989, ch. 38, §114-11(d), *People v. Case*, (Ill.App. 1 Dist. 1991) 577 N.E.2d 1291.

In the hearing conducted before the Court the defendant and several police officers testified before the Court. The Court has also considered the testimony of officer Walters and Prindable that was given on February 18, 1987.

The defendant testified that immediately upon his being taken into custody he requested an attorney. The local police officers could not remember if the defendant had requested an attorney. Walters and Prindable arrested defendant after he had given the disputed statement to agent Parisi. They testified that after he was advised of *Miranda* he immediately requested an attorney.

The Supreme Court of the United States explained in the case of *McNeil v. Wisconsin* (1991) that a second layer of prophylaxis for the *Miranda* right to counsel was created in *Edwards v. Arizona*, 451 U.S. 477 (1981).

> Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," which means, we have most recently held, that counsel must be present, *Minnick v. Mississippi*, (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspects's statements are presumed voluntary and therefore inadmissable as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The *Edwards* rule, moreover, is not offense-specific: **once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be**

reapproached regarding *any* offense unless counsel is present. *Arizona v. Roberson*, 486 U.S. 675 (1988).

Considering all the testimony presented, the Court concludes that the state has failed to meet its burden of proof regarding the voluntariness of the statement.

WHEREFORE, the motion to suppress is granted.

/s/ JAMES K. DONOVAN
Hon. James K. Donovan
Circuit Judge

[Filed June 10, 1992]

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

People of the State of Illinois,	)	
	)	
vs	)	No. 86-CF-305
	)	
LLOYD PERKINS	)	
Defendant	)	

ORDER

The above styled case is before the court on State's Motion to reconsider the Court's order allowing the defendant's motion to suppress statements given to the police.

The Court has considered the brief submitted by the State on May 18, 1992. The State's argument is compelling, but does not overcome the reasoning in *McNeil v. Wisconsin* 59 LW 4636 (1991), considering the factual conclusions drawn by the court.

The Supreme Court of the United States explained in the case of *McNeil v. Wisconsin* 59 LW 4636 (1991) that a second layer of prophylaxis for the *Miranda* right to counsel was created in *Edwards v. Arizona*, 451 U.S. 477 (1981).

> Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," which means, we have

most recently held, that counsel must be present, *Minnick v. Mississippi*, (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspects's statements are presumed involuntary and therefore inadmissable as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The *Edwards* rule, moreover, is not offense-specific: **once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.** *Arizona v. Roberson*, 486 U.S. 675 (1988).

Considering all the testimony presented, the Court concludes that the state has failed to meet its burden of proof regarding the voluntariness of the statement.

WHEREFORE, the State's motion to reconsider the defendant's motion to suppress is denied.

/s/ JAMES K. DONOVAN
Hon. James K. Donovan
Circuit Judge